IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSE JAVALERA-MARTINEZ,
Petitioner.

No. 2 CA-CR 2019-0142-PR
Filed October 31, 2019

Petition for Review from the Superior Court in Pima County
No. CR20104387001
The Honorable Renee T. Bennett, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Scott A. Martin, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Espinosa concurred.

S T A R I N G, Presiding Judge:

¶1 Jose Javalera-Martinez seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Javalera-Martinez has not shown such abuse here.

¶2 After a jury trial, Javalera-Martinez was convicted of negligent child abuse under circumstances likely to produce death or serious physical injury. The trial court suspended the imposition of sentence and placed Javalera-Martinez on a four-year term of probation. On appeal, Javalera-Martinez argued the court had erred by giving the jury instructions for the lesser-included offenses of negligent and reckless child abuse, asserting the evidence supported only the charged offense of intentional child abuse. Concluding Javalera-Martinez had invited any error by requesting the instructions on the lesser offenses, we affirmed his conviction and the imposition of probation.[1] *State v. Javalera-Martinez*, No. 2 CA-CR 2016-0343 (Ariz. App. Nov. 20, 2017) (mem. decision).

¶3 Javalera-Martinez sought post-conviction relief, raising four arguments: (1) there was "newly-discovered evidence" that his defense counsel had not requested the lesser-included-offense instructions; (2) if counsel had requested the instructions, she was ineffective; (3) there was "newly-discovered evidence" that the state's "medical theory of the case is unsupported by quality scientific evidence;" and (4) he is actually innocent. The trial court summarily dismissed the petition. This petition for review followed.

¶4 Javalera-Martinez limits his petition for review to the first two claims raised below. He first repeats his argument that defense counsel had

---

[1]We also rejected Javalera-Martinez's claim that the evidence was insufficient to support his conviction.

not requested the instructions for reckless and negligent homicide, and thus had not invited any error. This argument is grounded primarily in affidavits from counsel and her paralegal asserting the filed request was inconsistent with their regular practices and with the defense theory of the case. As he did below, he frames this claim as one of newly discovered evidence. He also reurges his claim that, if counsel inadvertently requested the instructions, she was ineffective.

¶5 Javalera-Martinez's first claim is not cognizable as a claim of newly discovered evidence under Rule 32.1(e), because the central factual question is not material to the verdicts or sentences, but instead concerns a factual question about the conduct of trial. But, a Rule 32 proceeding may "provide[] a remedy for matters which do not have sufficient record to provide appellate review." *State v. Cabrera*, 114 Ariz. 233, 236 (1977). Whether counsel actually filed the jury instruction request that led us to conclude counsel had invited error is such a matter.

¶6 We need not resolve the question, however. Nor need we determine whether counsel fell below prevailing professional norms by requesting the instructions, if she did so. *See State v. Kolmann*, 239 Ariz. 157, ¶ 9 (2016) (colorable claim of ineffective assistance requires proof counsel fell below prevailing professional standards and conduct prejudiced defendant). Even had counsel not invited the purported error by requesting the instructions, she did not object to the state's request for similar instructions. And, insofar as Javalera-Martinez argues counsel was ineffective in failing to object, he has not made a colorable claim. The decision whether to object to the instructions could have been tactical, and counsel does not assert in her affidavit that she had intended to object to the state's request but failed to do so. *See State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (reasoned tactical decision by counsel cannot support claim of ineffective assistance).

¶7 The trial court made clear that it would have given the instructions based only on the state's request. Even absent invited error, because counsel did not object, Javalera-Martinez would have been entitled to relief on appeal only if he demonstrated any error in giving the instructions was fundamental and prejudicial. *See State v. Escalante*, 245 Ariz. 135, ¶ 1 (2018). Javalera-Martinez has made no effort to meet that burden, either on appeal or in this proceeding. Thus, he has not shown he is entitled to post-conviction relief. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (argument waived because

defendant did not argue alleged error was fundamental); *see also Kolmann*, 239 Ariz. 157, ¶ 9 (claim of ineffective assistance requires showing of prejudice).

¶8 We grant review but deny relief.